

Nothing turned on the communication of the offer to sell from the appellant to the respondent or on the respondent's acceptance and communication of that acceptance to him. There was therefore an offer and an acceptance of that offer to constitute a binding contract. But at the appeal, his counsel (who did not appear in the court below) took one short point. He submitted that there was no consideration for the offer to sell and the agreement was void as being without consideration. Having said so in rather fewer words than that we have managed to note down his submission, he then sat down. We were not ungrateful, that in at least this one instance we had been spared being taken through fundamental legal principles and elementary legal procedure which would seem to be our lot nowadays.

The answer to the appellant's contention lies in illustration (a) to section 24 of the Contracts Act, 1950 (Revised, Act 136). Now, as was said in the Privy Council in *Mohamed Syedol Ariffin v. Yeoh Ooi Gark*⁽¹⁾:

"Illustrations appended to sections of a statute should be accepted if that can be done, as being of relevance and value in construing the text; they should only be rejected as repugnant to the section as the last resort of construction."

This particular illustration is in these words:

"(a) A agrees to sell his house to B for \$10,000. Here, B's promise to pay the sum of \$10,000 is the consideration for A's promise to sell the house and A's promise to sell the house is the consideration for B's promise to pay the \$10,000. These are lawful considerations."

The agreement must be seen to be a case of executory consideration. A promise is made by one party in return for a promise made by the other; in such a case each promise is the consideration for the other. "A promise made without a consideration is void. But where there is a promise against a promise, one promise is consideration of the other because each may have his action against the other for non-performance;" *per* Holt C.J. in *Harrison v. Cage*.⁽²⁾ The rule that consideration can consist of mutual promises is now too well established to be questioned.

Counsel for the appellant was therefore right. The question of consideration was of a very elementary nature in a matter of an offer to sell and acceptance of that offer but his contention that there was no consideration was entirely unfounded.

The appeal was dismissed with costs. We did not find it necessary to call on counsel for the respondent.

Appeal dismissed.

Solicitors: S.K. Lingam & Co.; Selva & Co.

NG YIK SENG & ANOR. v. PERWIRA HABIB BANK MALAYSIA BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.J.J.) March 12 & 31, 1980]

[Kuala Lumpur — Federal Court Civil Appeal
No. 153 of 1979]

Practice and Procedure — Application for summary judgment — Leave to defend — Action on guarantee of overdraft — Overdraft secured by legal charge — Charge not realised — R.S.C. 1957, O. 14 — Evidence Act, 1950, s. 73.

Banking — Overdraft — Secured by charge — Guarantee — Action on guarantee — Realisation of charge.

In this case the respondent had granted an overdraft to a company, for which the appellants and two other directors of the company stood guarantee in their personal capacities. The overdraft was secured by a charge on a piece of property. When the overdraft was not repaid, the respondent brought an action against the guarantors. Subsequently they applied for summary judgment against the appellants. The appellants denied that they executed the guarantee. The Senior Assistant Registrar allowed the application but her decision was reversed by the High Court which gave conditional leave to defend, on payment of the sum of \$125,000 into Court. There were great variations in the signatures of the appellants not only in the documents but in the specimens supplied by them. The appellants appealed and the respondent cross-appealed.

Held: (1) there was a triable issue in this case and the appellants were rightly given leave to defend;

(2) in view of the fact that the charge could be realised to meet the overdraft, the present case might turn out to be a useless piece of litigation and in the circumstances the appellants should be given unconditional leave to defend.

Cases referred to:-

- (1) *Webster v. Bakewell R.D.C.* (No. 2) (1916) 115 L.T. 678.
- (2) *Metropolitan Bank v. Pooley* (1885) 10 App. Cas. 210, 221.
- (3) *Riches v. Director of Public Prosecutions* [1973] 1 W.L.R. 1019, 1027; [1973] 2 All E.R. 935, 942.

FEDERAL COURT.

Izabella de Silva for the appellants.

M. Chang for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The respondent is a bank and in respect of an overdraft account granted to Eternal Graphie Reproduction Sdn. Bhd. (the Company) required and obtained four guarantors jointly and severally to guarantee the repayment of the money advanced on the overdraft. The four directors were also the directors of the Company but their guarantee was personal. At the relevant time the account stood at \$251,091.64 inclusive of interest. The respondent made demand for the repayment of this overdraft sum from the guarantors and when they failed to make good the sum advanced, took out the writ in this action against all 4 guarantors for the repayment of this sum.

On April 13, 1979, the respondent made an Order 14 application against the present appellants. No action was taken against the other 2 guarantors, we believe, because they had been previously adjudicated bankrupts.

The appellants resisted the application by an affidavit in which one ground and one ground alone

was advanced. They did not execute the guarantee. The signatures thereon were not theirs. The Senior Assistant Registrar allowed the application but her decision was reversed by the High Court which gave conditional leave to defend. The condition imposed was for the payment of the sum of \$125,000 into the court on or before a certain date and the defence was ordered to be filed within 2 weeks.

We pause here to suggest the great desirability where the court gives leave to defend conditional on the payment into court of a sum of money, of making a further order that upon failure to comply with the condition, the plaintiff applicant will be at liberty to sign final judgment. This further order will avoid the necessity for the plaintiff having to come to court again to sign judgment for non-fulfillment of the condition upon which leave was given.

From the decision of the High Court, both the guarantors and the Bank appeal to this court.

It is clear that the learned judge allowed the appeal in part because from the documents which were documents executed in the ordinary course of business there are even to an untutored eye great variations in the signatures of the appellants and his doubt as to the genuineness of the appellant's signatures on the letter of guarantee was not resolved by the failure of the Bank official before whom the guarantee was executed to come forward to say that the guarantors personally appeared before him and in his presence did sign the document in question. His decision therefore to give leave to defend was, with respect, a rightful exercise of his discretion. In arriving at his decision, he was clearly acting under the powers conferred on him by section 73 of the Evidence Act, 1950 and well might he do so when all he had to do in the application before him was to consider whether the point raised was sufficient to amount to a triable issue. But it was also very obvious in the specimens of their signatures provided by the appellants themselves in the documents signed by them which had nothing to do with the Bank, there are equally great variations. In these circumstances we consider that the learned judge had sufficient and cogent reasons to doubt the genuineness of the defence and his decision to give conditional leave to defend was with respect the right one.

One salient fact that emerged at the hearing. It was before the lower court but no point was taken on it. The overdraft had been secured by a legal charge on a piece of property by M/s. Ho Wai Seng Bhd. This charge constituted therefore the first and real security for the repayment of the loan and was a readily realisable security. The maximum limit of the security provided in the charge was \$280,000, which would mean that in the opinion of the Bank the property was worth considerably more. In the time that had elapsed since the execution of the charge, properties in and around Kuala Lumpur have appreciated greatly in value — a fact so notorious that in our view courts can take judicial notice of it. The amount outstanding on the overdraft was only \$251,091.64. *Prima facie*, therefore, the realisation of the charge would more than repay the overdraft. In these circumstances the appellants contended that "in law and equity" they should only be called on to meet their

guarantee if there should be any deficit after the sum to be realised from the sale of the charged property had been determined.

This contention is not without attraction. We have not heard any substantial submissions at length on this point which was not ruled on in the court below, but while it is uncertain that the claim against the appellants in the circumstances of a charge is bad "in law and equity", it is, in our view, clear that in such circumstances an action to obtain judgment against the guarantors which would open avenues of execution to the chargee and even bring the guarantors into the Bankruptcy Court when in the final accounting, the appellants needed not to be called to honour their guarantee, would be an abuse of the process of the courts. Where the plaintiff had no substantial interest in the subject of the litigation, had suffered no damage which could not easily be rectified and the action was a useless piece of litigation, the court dismissed it: see *Webster v. Bakewell R.D.C. (No. 2)*.⁽¹⁾ That was a case where the facts were present at the issue of the writ. The present case may not be so but may well turn out to be effectively a case of, to echo the words used, a useless piece of litigation, so that a court may very well in the exercise of its discretion stay, not dismiss, the action until after the completion of the sale of the property that had been charged to the Bank. A stay (or even dismissal) of proceedings may "often be required by the very essence of the justice to be done", per Lord Blackburn in *Metro-politan Bank v. Pooley*,⁽²⁾ so as to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation. See also *Riches v. Director of Public Prosecutions*⁽³⁾ per Lawton L.J. at pages 1027 and 942 of the respective reports in [1973] 1 W.L.R. 1019 and [1973] 2 All E.R. 935.

We however consider that the application for a stay should, if thought one with reasonable prospects of success, be made in the first place to the court before whom the action is brought.

But for the above reasons we allowed the appeal with costs and granted the appellants unconditional leave to defend. Defence to be delivered within 2 weeks. The cross-appeal was dismissed with costs.

Appeal allowed.

Solicitors: Chooi & Co.; Suhaimi Khor Zulkifli & Chang.

**K. MURUGESU v.
MICHAEL CHONG NGIAN FONG
K. MURUGESU v.
REGISTRAR OF TITLES & ORS.**

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.J.J.) March 13 & 31, 1980]

[Kuala Lumpur — Federal Court Civil Appeals
Nos. 69 & 154 of 1979]

Practice and Procedure — Execution of judgment — Prohibitory order — Sale of land — Proceeds retained towards judgment.

Land Law — Private caveats — Caveats extended until further order — Caveats withdrawn at instance of caveators — Registration of transfer valid — National Land Code, ss. 325 and 327.